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IN THE

Supreme Court of the United States

October Term, 1962

No. 771

ALLEN DUDLEY, GRADY BENNETT, J. E. LAWTON, J. J. REDDICK, ROY PRETTYMAN, ERVIN REGAL, *Petitioners*,

v.

ORANGE COUNTY, FLORIDA, a Political Subdivision, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ALLEN DUDLEY, GRADY BENNETT, J. E. LAWTON, J. J. REDDICK, ROY PRETTYMAN, ERVIN REGAL, *Petitioners*,

v.

ORANGE COUNTY, FLORIDA, a Political Subdivision, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners pray that a wirt of certiorari issue to review the judgment of the Supreme Court of the State of Florida, entered on July 16, 1962 and the order of the Court denying Plaintiffs' motion for rehearing, entered on October 11, 1962.

OPINIONS BELOW

The opinion of the Supreme Court of Florida has been officially reported at 146 Southern Reporter 2nd Series, page 379 and appears on page 11a of the Appendix. The opinion of the District Court of Appeals of Florida, Second District has been reported at 137 Southern Reporter 2nd Series, page 859, and appears in the Appendix starting at page 3a.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Florida was dated and entered the 16th day of July 1962 and the order of the Court denying plaintiffs' motion for rehearing was dated and entered October 11, 1962 and is shown at 146 Southern Reporter 2nd Series, page 379.

The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code.

QUESTIONS PRESENTED

1. Whether or not the acts of a State or one of its agencies or subdivisions thereof in erecting dams which divert the natural flow and drainage of waters proximately resulting in damage to the properties of private land owners so as to render the same uninhabitable or no longer useful for the purposes for which said lands were customarily used constitutes a taking within the meaning of the Fifth and Fourteenth Amendments of the Constitution of the United States, and for which just compensation is required.

CONSTITUTIONAL PROVISIONS INVOLVED

". . . nor shall private property be taken for public use, without just compensation."

AMENDMENT V,
CONSTITUTION OF THE UNITED STATES

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

AMENDMENT XIV,
CONSTITUTION OF THE UNITED STATES

STATEMENT OF THE CASE

This case arises out of a suit by certain private property landowners, the petitioners herein, seeking an injunction against Orange County, Florida, a political subdivision, respondent herein, from continuing to erect any further dams which divert the natural flow of the waters of Long Lake, which said acts were causing and continuing to cause severe damage to the property of petitioners. In addition, said suit prayed that damages be awarded to petitioners for the taking of said property pursuant to the constitutional guarantees of the United States Constitution, Amendment Five, and a similar provision in the Constitution of the State of Florida, Declaration of Rights, Section 12.

The respondent, in order to prevent alleged flooding of adjoining land, put three dams on Long Lake, one at the west end and two at the east end. These dams interferred with the natural drainage of the lake which would naturally drain into other natural lakes and to lower land lying on the east side of the east dam. These acts of the respondent have caused petitioners' property to be flooded and made unusable and the petitioners brought this action seeking a mandatory injunction to force respondent to allow the lake to take its natural flow and prayed also for damages for harm done to the land because of the wrongful taking of the land.

The respondent answered admitting in substance almost all the facts in petitioners' complaint but claimed that they were justified in building the dams and bridge on the grounds that it was necessary in order to prevent flooding of other areas, that it was only temporary, and that the flooding of petitioners' land did not constitute a taking within the meaning of the 14th Amendment of the Constitution of the United States and the Declaration of Rights of the Constitution of the State of Florida.

The Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, upheld the respondent's contention and ruled that no injunctive relief was available because the condition was only temporary and therefore could not be subject to an injunction nor was it a taking and that such acts were justified on the part of the respondent by virtue of the police powers of the State. It is from this order that the petitioners appealed to the District Court of Appeals of Florida (Second District). That Court affirmed the decree of the Circuit Court. See Volume 137 Southern 2nd 859 (1962), wherein the District Court held, inter alia, that the aforesaid actions of the County did not constitute a taking of the property of the petitioners for which the Constitution provides the payment of just compensation and that the actions of the respondent county were authorized under the police power of the State.

It was from that final order that the petitioners brought an Appeal alleging the violation of certain State and Constitutional rights, pursuant to the Constitution of the State of Florida, Declaration of Rights, Section 12, and the Constitution of the United States, Amendment Five, to the Supreme Court of the State of Florida. On July 16, 1962, the Supreme Court of the State of Florida entered its order denying the petitioners' Appeal. Thereafter, on October 11, 1962, the Supreme Court of the State of Florida denied the petitioners' motion for rehearing on their Appeal.

RAISING THE FEDERAL QUESTIONS

Federal jurisdiction, in the Court of first instance, was based upon the fact that the acts of the State in erecting dams and thereby diverting the natural flow and drainage of Long Lake, which resulted in damage to the properties of the petitioners (Plaintiffs therein) so as to render their properties uninhabitable or no longer useful for the purposes for which those lands were customarily used, consti-

tuted a taking within the meaning of the Fifth and Fourteenth Amendments of the Constitution of the United States and, for that reason, just compensation was required.

REASONS FOR ALLOWANCE OF THE WRIT

I. The acts of the County in erecting dams which diverted the natural flow and drainage of the waters of Long Lake, which acts proximately resulted in damage to the properties of the petitioners, were acts which could not be justified under the police power of the State and when those acts rendered the properties uninhabitable and no longer useful for the purposes for which said lands were customarily used, said acts constituted a taking within the meaning of the Fifth and Fourteenth Amendments to the Constitution of the United States and for which just compensation is required

The Federal rule has long been that when a permanent flooding of riparian lands occurs and when this flooding renders those lands practically valueless, there is a "taking" within the meaning of constitutional provisions. In *2 Nichols on Eminent Domain* 257, the author states:

> "It is held in the federal courts that a permanent flooding of riparian lands, rendering them practically irreclaimable and valueless is a taking . . . A single flood of short duration, or occasional temporary flowage is not usually held to be a taking but this is, of course, a question of degree, and a serious flood, especially if frequently recurring, might well be held to fall on the other side of the line. It has also been held that it is a taking of property to turn the current of a stream upon private land so as to wear it away, if the owner cannot avert injury by reasonable precautions."

The testimony taken in the lower court proved that the acts of the County in erecting the dams amounted to an actual physical invasion of the property by the flood waters caused by the acts of the County in wrongfully diverting the natural flow of the water. Some of the property owners lost their homes, the property became uninhabitable.

Others who had used their property for agricultural and citrus purposes for many years, could no longer do the same. The properties from the point of view of earning a profit had become valueless. From the point of view of habitation the same had become useless. See the particular references to portions of the testimony cited hereinafter.

Early in our history, the Supreme Court of the United States held that where the State of Wisconsin having, in the process of its system of improving the navigation of the Fox River, authorized the erection of a dam by which the waters of the lake were raised so high as to cause the water to overflow onto the land of a private party an action at common law for damages was sustainable. See *Pumpelly* v. *Green Bay and Mississippi Canal Company*, 13 Wall 166 (1872). Speaking for a unanimous court, Mr. Justice Miller stated (at page 166) the argument of the defendant that there is no taking of the land within the meaning of the constitutional provision and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation:

> "It would be a very curious and unsatisfactory result if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the com-

> mon law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good which had no warrant in the laws or practices of our ancestors."

In *Sinnickson* v. *Johnson*, 2 Harr. (N.J.) 129, the defendant had been authorized by an act of the state legislature to shorten the navigation of Salem creek by cutting a canal and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the state of New Jersey then had no analogous provision in its constitution as similar to Florida's Declaration of Rights, Section 12, the Supreme Court held the statute to be no protection to the action for damages. Justice Dayton stated:

> ". . . this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensaiton is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle."

See also *Robbin* v. *R. Co.*, 6 Wis. 636; *Shepardson* v. *R. Co.*, 6 Wis. 605; *Powers* v. *Bears*, 12 Wis. 213; *Davis* v. *R. Co.*, 12 Wis. 16; *Pettibone* v. *R. Co.*, 14 Wis 443; *Ford* v. *R. Co.*, 14 Wis. 609; *Lopp* v. *Chamberlain*, 17 Wis. 504 and 20 Wis. 135; *Carpenter* v. *R. Co.*, 24 N.Y. 655; *Wager* v. *R. Co.*, 25 N.Y. 526; *Stacey* v. *R. Co.*, 27 Vt. 39; *Cushman* v. *Smith*, 34 Me. 247; Ang. Water-Courses, § 465; see *Hooker* v. *N. Hav. & N. Co.*, 14 Conn. 146; *Canal Appraisers* v. *People*, 17 Wend. 604.

United States v. *W. R. Cress*, 243 U.S. 746 (1916), involved two consolidated actions wherein the plaintiff sought to recover against the United States compensation for the taking of lands and water rights by means of back-

water resulting from the construction and maintenance by the government of certain locks and dams upon the Cumberland and Kentucky Rivers, respectively, in the State of Kentucky in the aid of navigation upon these rivers. Speaking for the court, Mr. Justice Pitney reasoned that although the states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, this right is subject to the control of the Fifth Amendment against the taking of private property for public use without just compensation. See *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 339, 37 L. Ed. 463, 471; *United States* v. *Lynah*, 188 U.S. 445, 465, 47 L. Ed. 539. The government contended that the damage to one of the petitioner's land by the overflow on approximately six (6) acres because it depreciated its value only to the extent of one-half does not measure up to a taking but is only a "partial injury" for which the government is not liable. But to this contention the Court reasoned that it is the *character of the invasion* not the amount of damage resulting from it so long as the damage is substantial, that determines the question whether it is taking. See page 48 of the opinion. The Court went on to say (at page 48):

> "There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right of compensation must arise in the one case as in the other. If any substantial enjoyment of the land still remains to the owner, it may be treated as a partial instead of a total devesting (sic) of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain."

In *United States* v. *Lynah*, *supra*, the plaintiff alleged that they were the owners of certain real estate bordering on the Savannah River and that the government

in the exercise of its power of eminent domain and regulation of commerce and pursuant to duly empowered acts of Congress, placed dams and other obstructions in the river in such manner as to hinder its natural flow and to raise its water so as to overflow the lands of plaintiff and to overflow to such an extent as to cause a total destruction of its value. The Supreme Court of the United States said (at pages 548-549):

> "Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

In the case at bar, the defendant County would argue that the construction of the dam was necessary pursuant to statute (Civil Defense Act; Florida Statutes, Chapter 252.07) and, therefore, any injury resulting to riparian proprietors or others is an injury which is purely consequential and for which the government is not liable, but in the Lynah case the Court passed upon a similar contention. Therein it was contended that what was done by the government was done in improving the navigability of a navigable river and that it is given by the constitution full control over such improvements and that if in doing any work therefore injury results to riparian proprietors or others, it is an injury which is purely consequential and for which the government is not liable. To that the Court stated (at page 35):

> "But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the government may appropriate the property, it cannot do so without being liable to the obligations passed by the 5th Amendment of paying just compensation."

Similarly in *Monongahela Navigation Co.* v. *United States, supra,* the Court stated:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation."

See also *Scranton* v. *Wheeler,* 179 U.S. 141, 153 45 L. Ed. 126, 133.

In *Conger* v. *Pierce County,* 193 Pacific 377 (1921), the Supreme Court of Washington dealt with a problem wherein an act of the State Legislature authorized counties to contract together for cooperation in the improvement and protection of rivers. In that case, a county straightened and otherwise improved a navigable stream pursuant to the latter statute for the purpose of preventing it from overflowing its banks and thereby doing damage to public property. The improvement caused a part of the plaintiff's property to erode and wash away and the Court held that the State cannot take or damage private property for a public use without compensation to the owner, nor can it authorize the taking or damaging which is prohibited to it under a constitutional provision analogous to that in the Florida Declaration of Rights. The Court recognized that though it was not dealing with an eminent domain proceeding, nevertheless the principles of law involved in the power to take property for public use were seeking to justify the damage alleged to have been done by them on the theory that they were acting by virtue of law and as an arm of the State and for the use of the State and the use of the public good. This is similar to the arguments raised

by the petitioners in the case at bar. To this argument, the Court stated at page 380:

> "Since, therefore, our Constitution expressly forbids the taking or damaging of private property for a public use, except upon just compensation first made, on what theory can respondents be relieved from any damage to appellant's property as a direct result of the improvements which were made in the Puyallup river? Certainly not simply because they were acting as an arm of the State, or alone because they were acting for the good of the public, or simply on the theory that the individual must suffer for the public good. To hold that they would be relieved on any of these grounds would be entirely to disregard the express provisions of our Constitution. The state itself cannot take or damage private property for a public use, without compensating the owner; nor can it authorize a taking or damaging which is prohibited to it. The only other principle of law under which respondents might be relieved would be the police power of the sovereign, because the only ways known to the law whereby private property may be taken or damaged by the public, are by the principles of eminent domain or those of the police power."

The Court then met the issue raised which is the identical issue raised by the petitioners in the case at bar: Were the defendants in the exercise of police power in making improvements they made in the river in question. The Court held that its answer must be in the negative and reasoned at page 380:

> "Indeed it is the police power theory upon which the respondents seem most strongly to rely. It is probable that this power is the most exalted attribute of government, and, like the power of eminent domain, it existed before and independently of Constitutions. It is easy to understand the principles upon which the police power doctrine is based, but difficult to define in language its limitations. It is not inconsistent with nor antagonistic to the rules of law concerning the taking of property for a public use. Because of its

elasticity, and the inability to define or fix its exact limitations, there is sometimes a natural tendency on the part of the courts to stretch this power in order to bridge over otherwise difficult situations, and for like reasons, it is a power most likely to be abused. It has been defined as an inherent power in the state, which permits it to prevent all things harmful to the comfort, welfare and safety of society. It is based on necessity. It is exercised for the benefit of the public health, peace and welfare. Regulating and restricting the use of private property in the interest of the public is its chief business. It is the basis of the idea that the private individual must suffer without other compensation than the benefit to be received by the general public. It does not authorize the taking or damaging of private property in the sense used in the Constitutions with reference to taking such property for public use. Eminent domain takes private property for a public use, while the police power regulates its use and enjoyment, or, if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health and general welfare of the public."

Other cases have long held that any damage done in a a case of similar nature cannot be excused under any reasonable interpretation of the law of police power. See *Burroughs* v. *Grays Harbor Room Co. & Humptulips Driving Company*, 44 Wash. 630, 87 Pac. 937; *Askam* v. *King County*, 9 Wash. 1, 36 Pac. 1097; *Ordway* v. *Village of Canisteo*, 66 Hun. 569, 21 N.Y. Supp. 835; *Noonan* v. *City of Albany*, 79 N.Y. 470, 35 Am. Rep. 540; *Bradburry* v. *Vandalia Levee & Drainage Dist.*, 236 Ill. 36, 86 N. E. 163, 19 L.R.A. (N.S.) 991, 15 Ann. Cas. 904; *Barden* v. *Portage*, 79 Wis. 126, 48 N.W. 210; *Town of Jefferson* v. *Hicks*, 23 Okl. 684, 102 Pac. 69, 24 L.R.A. (N.S.) 214; Lewis, Eminent Domain § 115, 285, 306.

In *Eastman* v. *Clackamas County*, 32 Fed. 24, 32, the Court, in considering a problem analogous to the one at bar, stated:

"Whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man

> shall continue to have a remedy for by due course of law." When this Constitution was formed and adopted, it was and had been the law of the land, from comparatively an early day, that a person should have an action for damages against a county for an injury caused by its acts or omission. If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the Legislature in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt? and, if it cannot do so in such cases, why can it in this?"

See also *Thofler* v. *Tillamook County*, 146 Pac. 828 (1915). See also *Barron* v. *City of Memphis*, 80 Southwestern Reporter 832; *Leard* v. *Pennsylvania R. Co.*, 78 Atlantic Reporter 229 (1911).

In the case at bar there is no question but that the acts of the respondent in constructing and erecting the dams caused the damages to the petitioners as complained of in their complaint. Indeed, the cause and effect was admitted by respondent in its answer. The testimony of the petitioners went uncontradicted on those points. For example see Tr. 17, Tr. 20, Tr. 21, Tr. 22 and Tr. 23. The testimony taken before the Lower Court is a long clear picture of extensive damage to each of the petitioners' properties, to such an extent as to a complete deprivation of the petitioners rights to the use and value of their property. The testimony showed that there were acres and acres of land belonging to the petitioners which were completely under water. For instance see Tr. 32, Tr. 37, Tr. 38, Tr. 40, Tr. 42. The testimony is replete and uncontradicted that the acts of the respondent caused many of the petitioners lands to become totally unfit for agricultural purposes and for the growing of citrus trees, purposes for which the land had been used in many cases in excess of fifty years. In addition, homes have been flooded and personal property totally destroyed and homes that had been occupied for as long as forty to fifty years have been rendered almost

totally valueless. It is clear, then, that the acts of the respondent have caused the damages complained of are clearly a taking within the meaning of state and federal constitutional provisions as interpreted to both our state and federal courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Copy of Final Decree Filed and Recorded December 1, 1960, in Chancery Order Book 198, Pages 592, 593, and 594 (Formal Parts Omitted)

This cause coming on for final hearing on the plaintiffs' complaint and defendant's Answer, and the Court having heard all the evidence presented by both parties and argument of counsel for plaintiffs and defendant having been heard and the Court on November 15, 1960, having entered the following opinion on the facts and law of the case, to wit:

"Counsel for the respective parties have argued before the Court and submitted citations of authorities which they have found to be most applicable to the case.

The Court is of the opinion that the action of the Defendant in erecting and maintaining the dikes in question was authorized both under the Civil Defense Act as well as under the police power. Although such action was lawful, not constituting a tort, yet if as a consequence of such action the lands of the Plaintiffs were flooded to the extent that it amounted to a taking from them, then under the decisions of our Appelate Courts they would be entitled to compensation which might be determined by this Cour [sic] or by condemnation proceedings.

After carefully studying the authorities furnished by counsel, I have reached the conclusion that the flooded condition is not permanent invasion of Plaintiff's property but is only temporary which has resulted in damage to them but which is not recoverable at law. In order to constitute a taking for which the owners are entitled to compensation it must not only be actualy [sic] but permanent, which this is not.

Defendant asserted in its Answer that all it had done was temporary and to protect the public health and welfare until a permanent drainage system could be built and it

offered evidence to show that diligence was being exercised toward the establishment of such drainage system.

The Court is naturally sympathetic toward the Plaintiffs on account of the damage they have suffered but upon a determination that the condition created by defendant in its efforts to protect the County road and many property owners from disaster, same is temporary as opposed to being permanent and that the law does not allow a recovery for such damage, I am obliged to rule against contention that the Court award them damages."

And the Court being fully advised, it is thereupon

ORDERED, ADJUDGED and DECREED:

(1) That the Court has jurisdiction over the subject matter in this case and the parties to this litigation.

(2) That the Answer of Defendant states a defense to the Complaint herein and Defendant has proved the material allegations of such Answer.

(3) That the relief prayed for the Plaintiffs is hereby denied.

(4) That the Defendant, Orange County, shall, with all due diligence, lower the water level of Long Lake to the level where said lake would be in the absence of the dams at each end of the lake.

(5) That this Court shall retain jurisdiction of this cause to make such other and further Orders as may be necessary to prevent any more damage to plaintiff's property than is absolutely unavoidable under the circumstances of this case.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida, this 1st day of December, 1960.

FRANK A. SMITH
Circuit Judge

Order of the Court of Appeals

IN THE
DISTRICT COURT OF APPEAL OF
FLORIDA
SECOND DISTRICT

No. 2352

ALLEN DUDLEY, et al., *Appellants*,
v.
ORANGE COUNTY, FLORIDA, a Political Subdivision,
Appellee.

Appeal from the Circuit Court of Orange County, Florida;
Frank A. Smith, Judge.

February 16, 1962

The appellants as plaintiffs filed their complaint against the defendant-appellee, alleging that the defendant had built a dam on the west end of Long Lake and two dams on the east end of Long Lake and raised the grade of a public road, constructed without facilities for passage of water, which caused the water level in Long Lake to rise to the extent that the water level within the area of the dams was from five to nine feet higher than the adjacent lands which constitute the natural drain area for Long Lake, thereby causing the plaintiffs' lands, houses and businesses to be flooded and unusable, causing irreparable damage to the plaintiffs' property. The complaint prayed for injunctive relief. The County answered admitting much of the substance of the complaint, but alleging in great detail the existence of a natural disaster in the area during the time in question and also alleged that during this time, the area was designated a disaster area by the Governor of the State of Florida, the Federal Civil Defense Authorities, and the Board of County Commissioners of Orange County. They contend that even without the damming of the Lake, the level of the waters of the Lake would have been higher than normal; that the damming

only increased the degree of flooding; that in the course of the emergency, the County took these temporary measures to protect the health, convenience and welfare of the greatest number of its citizens; that it was proceeding as rapidly as possible to effect a permanent solution and to remove the temporary dams to which the plaintiffs objected; and that without such temporary measures, the homes of approximately seventy-five families valued in millions of dollars and the County roads within the area would have been damaged. The Court then entered the following Final Decree:

"This cause coming on for final hearing on the plaintiff's Complaint and defendant's Answer, and the Court having heard all the evidence presented by both parties and argument of counsel for plaintiffs and defendant having been heard and the Court on November 15, 1960, having entered the following opinion on the facts and law of the case to wit:

'Counsel for the respective parties have argued before the Court and submitted citations of authorities which they have found to be most applicable to the case.

'The Court is of the opinion that the action of the Defendant in erecting and maintaining the dikes in question was authorized both under the Civil Defense Act as well as under the police power. Although such action was lawful, not constituting a tort, yet if as a consequence of such action the lands of the Plaintiffs were flooded to the extent that it amounted to a taking from them, then under the decisions of our Appellate Courts they would be entitled to compensation which might be determined by this Cour(t) or by condemnation proceedings.

'After carefully studying the authorities furnished by counsel, I have reached the conclusion that the flooded condition is not permanent invasion of Plaintiff's property but is only temporary which has resulted in damage to them but which is not recoverable at law. In order to constitute a taking for which the owners are entitled to compensation it must not only be actualy, but permanent, which this is not.

'Defendant asserted in its answer that all it had done was temporary and to protect the public health and welfare until a permanent drainage system could be built and it offered evidence to show that diligence was being exercised toward the establishment of such drainage system.

'The Court is naturally sympathetic toward the Plaintiffs on account of the damage they have suffered but upon a determination that the condition created by defendant in its efforts to protect the County road and many property owners from disaster, same is temporary as opposed to being permanent and that the law does not allow a recovery for such damage, I am obliged to rule against contention that the Court award them damages.' "

And the Court being fully advised, it is thereupon

ORDERED, ADJUDGED AND DECREED:

(1) That the Court has jurisdiction over the subject matter in this case and the parties to this litigation.

(2) That the Answer of Defendant states a defense to the Complaint herein and Defendant has proved the material allegations of such Answer.

(3) That the relief prayed for by Plaintiffs is hereby denied.

(4) That the Defendant, Orange County, shall with all due diligence, lower the water level of Long Lake to the

level where said lake would be in the absence of the dams at each end of the lake.

(5) That this Court shall retain jurisdiction of this cause to make such other and further Orders as may be necessary to prevent any more damage to plaintiff's property than is absolutely unavoidable under the circumstances of this case."

The Florida Civil Defense Act, Chapter 252, Florida Statutes, expresses therein the purpose of the act. These purposes dare to authorize certain acts in those emergencies resulting from disasters caused first: by enemy attack, sabotage, or other hostile action, or, second: by natural causes, and in either event to provide for the common defense and to protect the public peace, health and safety, and to preserve the lives and property of the people of the state. Under the Act, the term "Civil Defense" means the preparation for and the carrying out of all emergency functions to prevent, minimize, and repair injury and damage resulting from disasters caused by a flood or other causes, and authorizes all activities necessary or incidental to the preparation for and carrying out of the functions. One of the political subdivisions of the state granted these powers is any county. Although the Act specifies in detail and vests specific emergency powers to the political subdivisions names, most all of the specific delegated emergency powers are prefaced by the statement, "in the event of actual enemy attack against the United States, or if a state of emergency contemplating imminent attack is declared to exist", so these specific additional emergency powers are not here involved. The Act does, however, grant certain powers and immunities to the political subdivisions in the event of natural disaster and among them are:

(1) Authorizes the state civil defense council to make available any equipment, services or facilities for use in any affected area. Section 252.12, Florida Statutes.

(2) Authorizes political subdivisions to appropriate and expend funds, equipment, materials and supplies for civil defense purposes. Section 252.09 (2) (a) Florida Statutes.

(3) Provides that any political subdivision (except in case of willful misconduct, gross negligence or bad faith), engaged in any civilian defense activity, complying with the Act, shall not be liable for damage to property as a result of such activity. Section 252.18 (2), Florida Statutes.

Section 12 of the Declaration of Rights of the Constitution of the State of Florida provides that private property shall not be taken without just compensation and this Act cannot be construed to nullify that provision. Careful examination of the Act discloses that there is a specific provision for the taking of private property only in connection with the exercise of emergency powers granted in the event of an emergency contemplated or during enemy attack, and even then the Act makes provision for determination and requires payment of just compensation. Section 252.07, Florida Statutes.

In addition to the specific powers granted to a county by the civil defense act, as limited and restricted as they are when applied to natural disasters, there is here involved the question as to whether or not under the general principles of law the county had the lawful authority to take these actions; and if so, to do so without compensation to these plaintiffs for their damages.

We refer to Nichols on Eminent Domain, Third Edition, Vol. I, as follows:

> "Section 1.42 (2). Police power.
>
> "(2) *Distinction between taking and regulating.* For the sake of accurate thinking it is well to keep in mind the fundamental distinction between the two powers in their application to private property. In the exercise of eminent domain property or an easement therein is taken from the owner and applied to public use

because the use or enjoyment of such property or easement therein is beneficial to the public. In the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property or his property is taken from him because his use or enjoyment of such property is injurious to the public welfare. Under the police power the property is not, as a general rule, appropriated to another use, but is destroyed or its value impaired, while under the power of eminent domain it is transferred to the state to be enjoyed and used by it as its own.

"(3) *Police power requires no provision for compensation.* A proper exercise of the police power by the sovereign does not require the payment of compensation. Compliance with an enactment of the legislature in the exercise of the police power for purposes of health, morals, safety or welfare without compensation does not constitute a damaging or taking of property without just compensation within the meaning of the law of eminent domain. It follows, therefore, that the constitutional provisions which limit the exercise of the power of eminent domain, so that just compensation must be provided for, have no application to and impose no limitation upon the proper exercise of the police power.

* * * * * * * * *

"Section 1.43 Destruction by necessity.

"(1) *Action by private individual.* More closely allied to the power of eminent domain is the power of destruction from necessity. In the case of fire, flood, pestilence or other great public calamity, when immediate action is necessary to save human life or to avert an overwhelming destruction of property, any individual may lawfully enter another's land and destroy his property, real or personal, providing he acts with reasonable judgment. * * * The right is a natural

one and requires no statutory sanction; in fact it is doubtful if the exercise of the right could be constitutionally prohibited, whereas eminent domain requires specific authority for the legislature to warrant its exercise even by municipal corporations or officers of the state.

"(2) *Action by public agent.* If the individual who enters and destroys private property happens to be a public officer whose duty it is to avert an impending calamity, the rights of the owner of the property to compensation are no greater than in the case of a private individual. The most familiar example of the exercise of this right is seen in the case of a fire. The neighbors and firemen freely trespass on the adjoining land, and houses are even blown up to prevent the spread of the conflagration. The danger of flood or the existence of a pestilence may call for equally drastic action.

"Statutes sometimes provide for compensation in such cases, but unless the provisions of the statute are strictly complied with, the owner stands no better than he did at common law.

"Even in those states in which the statutes regulate or specifically authorize the destruction of property in the presence of impending calamity, such legislation is not the exercise of a new power, but a recognition and continuation of the old power, and hence is due process of law, and does not effect a taking of property without compensation in the constitutional sense."

These general principles have been recognized to some degree by the courts of this state, see Paty v. Town of West Palm Beach, Fla. 1947, 29 So. 2d 363; and Pasternack v. Bennett, 1939, 138 Fla. 663, 190 So. 56.

On the question of whether or not the injunction should have been issued, it must be recognized that injunctions

should be issued cautiously; and mandatory injunctions are looked upon with disfavor, and the Courts are reluctant to issue them. Johnson v. Killian, Fla. 1946, 27 So. 2d 345.

With respect to whether or not the actions of the County constituted a taking of the property of the plaintiffs for which the payment of just compensation is required by the Constitution, it would have been necessary for the Court to have found that the flooding was a direct result of the dams of the County and the flooding must constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property. 12 Fla. Jur., Eminent Domain § 70; 18 Am. Jur., Eminent Domain, § 134; and 2 Nichols, Eminent Domain, § 6.23 (3).

The record here does not show a continuous flooding for a long period of time in order to work an almost complete destruction of the value of the land in order to destroy its value entirely, inflicting irreparable and permanent injury to effect a constructive taking as were the facts in Pumpelly v. G. B. & M. Canal Co., 1872, 13 Wall. 166.

The County introduced evidence to sustain the allegations of its answer, the chancellor resolved the questions of fact in favor of the County, and retained jurisdiction to prevent any more damage to plaintiffs' property than was absolutely unavoidable under the circumstances.

The decree is affirmed.

ALLEN, ACJ., and KANNER, J., Concur.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1962

Monday, July 16, 1962

ALLEN DUDLEY, GRADY BENNETT, J. E. LAWTON, J. J. REDDICK, ROY PRETTYMAN, ERVIN REGAL, *Appellants*,

v.

ORANGE COUNTY, FLORIDA, a political Subdivision, *Appellee*.

The attorneys for appellee have filed a motion for an order dismissing the appeal in the above cause, and upon consideration thereof, it is ordered that said motion be and the same is hereby granted, and the appeal which was entered in this cause in the District Court of Appeal of Florida, Second District, on March 28, 1962, be and the same is hereby dismissed.

GUYTE P. MCCORD
Clerk Supreme Court

THE STATE OF FLORIDA
SUPREME COURT

In the case of No. 31668 DUDLEY v. ORANGE COUNTY:

Rehearing Denied October 11, 1962.

Appeal dismissed without opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 771

ALLEN DUDLEY, GRADY BENNETT, J. E. LAWTON, J. J. REDDICK, ROY PRETTYMAN, ERVIN REGAL, *Petitioners*,

v.

ORANGE COUNTY, FLORIDA, a Political Subdivision, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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ALLEN DUDLEY, GRADY BENNETT, J. E. LAWTON, J. J. REDDICK, ROY PRETTYMAN, ERVIN REGAL, *Petitioners*,

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ORANGE COUNTY, FLORIDA, a Political Subdivision, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent herein, Orange County, a political subdivision of the State of Florida, by and through its undersigned attorneys files this its Brief in Opposition to the Petition for Writ of Certiorari heretofore filed herein and respectfully shows that said petition should be denied for the following reasons and on the following grounds:

I. The decree sought to be reviewed is not reviewable.

II. No Federal question was raised or decided.

III. The Florida Courts correctly decided the case and should be sustained.

I.

The Decree Sought to be Reviewed Is Non-Reviewable

Petitioners request a Writ of Certiorari directed to the Supreme Court of Florida to review its decision of July 16, 1962 (re-hearing of which was denied without opinion on October 11, 1962). This decision of the Supreme Court of Florida was merely an order dismissing an attempted appeal (or petition for Writ of Certiorari) from the earlier decision of the District Court of Appeal of Florida, Second District. It read in its entirety as follows:

> "The attorneys for appellee have filed a motion for an order dismissing the appeal in the above cause, and upon consideration thereof, it is ordered that said motion be and the same is hereby granted, and the appeal which was entered in this cause in the District Court of Appeal of Florida, Second District, on March 28, 1962, be and the same is hereby dismissed."

The Motion to Dismiss was upon the ground that under the provisions of Article 5, Section 4(2) of the Constitution of the State of Florida, the District Court of Appeal had the final appellate jurisdiction over the questions. (Other grounds were set out in the Motion to Dismiss but were waived by not setting them out or arguing them in appellee's Brief in the Supreme Court.)

The applicable portion of Article 5, Section 4(2) of the Constitution of the State of Florida dealing with the Supreme Court's jurisdiction reads as follows:

> Sect. 4(2) Jurisdiction.
>
> "Appeals from trial courts may be taken directly to the Supreme Court, as a matter of right, only from judgments imposing the death penalty, from

final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The Supreme Court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the Supreme Court. In all direct appeals and interlocutory reviews by certiorari, the Supreme Court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the Supreme Court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The Supreme Court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law." . . .

By granting appellee's motion to dismiss the Supreme Court of Florida merely agreed that the District Court of Appeal had final appellate jurisdiction over the questions raised. The decision only involved a matter of state law concerning its own court system. No federal question was involved or decided.

The following Florida cases show that the District Court of Appeal and not the Supreme Court had final

jurisdiction under the constitution of Florida: *Armstrong* v. *City of Tampa*, 106 So. 2d 407; *Carmazi* v. *Board of County Commissioners*, 104 So. 2d 727; *Lake* v. *Lake*, 103 So. 2d 639.

The order of the Supreme Court of July 16, 1962, was therefore not a "final judgment or decree rendered by the highest court of a State in which a decision could be had" under the provisions of Title 28, Sect. 1257 U.S. Code, so as to permit review of same by this Court and the petition asking for a Writ to review such order should be denied.

A very similar case decided by this Court was the case of *Randall* v. *Board of Commissioners of Tippecanoe County, Indiana*, 261 U.S. 252, 67 L. ed. 637, where this Court said:

> "... It therefore appears that the Supreme Court refused to take the case on appeal for want of jurisdiction, and the judgment of the highest court of the state in which a decision (253) in the suit could be had (Judicial Code, Sect. 237) is that of the appellate court, to which the writ should have been directed.
>
> The Writ of Error must, therefore, be dismissed. ..."

Also in the case of *Lane* v. *Wallace*, 131 U.S. Appx. cexix, and 26 L. ed. 703, this Court said:

> "The judgment of the Supreme Court of Louisiana in this case was one dismissing the suit for want of jurisdiction. Consequently, that court could not have decided the federal question presented to and passed upon by the district court. All it did was to determine that the district court was the highest court of the State in which a decision in the suit could be had. The writ of error

should, therefore, have been directed to that court instead of the Supreme Court. Such a writ can now issue if applied for and allowed in time.

The motion to dismiss is granted."

Petitioners have the burden of clearly showing that the federal question exists and was involved in the order of the court being reviewed. In case of doubt as to the nature of the decision this court will resolve the matter against its jurisdiction. See: *Norfolk and S. Turnpike Co.* v. *Virginia*, 225 U.S. 264, 269, 56 L. ed. 1082, 1086, 32 Sup. Ct. Rep. 828.

In the instant case we have merely an order dismissing the appeal. Viewed in any light petitioners have failed to show jurisdiction in this court to review the order sought to be reviewed.

II.

No Federal Question Was Raised or Decided

Under the decisions of this Court, it is clear that any right claimed under the United States Constitution, must be set up or claimed in the trial court whenever, under State practice, the highest State court, in reviewing judgments of the trial court, refuses to consider the questions not raised in the trial court. See:

Baldwin v. *Kansas*, 129 U.S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 443; *Morrison* v. *Watson*, 154 U.S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *Erie R. Co.* v. *Purdy*, 185 U.S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605, *Layton* v. *Missouri*, 187 U.S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137.

Petitioners did not raise any Federal question in the trial court. Under Florida practice, appellate courts

will not consider questions not raised in the trial courts as is clearly shown in the 1957 case of *Mariani* v. *Schleman*, 94 So. 2d 829, at page 831 thereof where the Supreme Court of Florida said:

> ". . . (5) It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this Court on appeal." *Jacques* v. *Wellington Corporation*, 134 Fla. 211, 183 So. 718; *Southern Liquor Distributors* v. *Kaiser*, 150 Fla. 52, 7 So. 2d, 600.

It is also basic to the jurisdiction of this court that the decision sought to be reviewed must have been one that *decided* a federal question. Unless the court actually decided a federal question, its decision is not reviewable. See:

> *Crowell* v. *Randell*, 10 Pet. 368, 9 L. ed. 458; *Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169; *Taylor* v. *Morton*, 2 Black, 481, 17 L. ed. 277; *Hurley* v. *Street*, 14 Wall. 85 20 L. ed. 786; *Caperton* v. *Bowyer*, 14 Wall. 216, 20 L. ed. 882; *Detroit City R. Co.* v. *Guthard*, 114, U.S. 133, 29 L. ed. 118 5 Sup. Ct. Rep. 841; *Israel* v. *Arthur*, 152 U.S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583.

The decree sought to be reviewed did not decide any question—federal or otherwise—it merely dismissed an abortive appeal not permitted by the Constitution of the State of Florida.

III.

Florida Decree Correct

If for any reason this court should decide it does have jurisdiction, respondent respectfully suggests that the rulings of the Florida courts were correct and that petitioners have mainly concerned themselves with matters of fact which were concluded against them by the trial judge who was the sole trier of the facts in this case. The trial court ruled that the County had acted in an emergency as it was propertly authorized to do under its general police power and the Civil Defense Statute, (Chapter 252, Florida Statutes), and it decided that the situation was a temporary one, ruled that there had been no taking, found that the County was taking steps to lower the water and was constructing a permanent drainage system and directed respondent to take all possible steps to lower the waters as soon as possible to minimize any damage to petitioner. The trial court retained jurisdiction to make such further orders as might be necessary to carry out its decree. The trial court's decree itself was thus not final so as to permit any appeal therefrom. Altogether, the findings by the trial court were contrary to any possibility that the petitioners were deprived of their property without due process of law contrary to the Fourteenth Amendment to the Constitution, and the Fifth Amendment is in no way involved.

The cases petitioners cited in their brief are without exception distinguishable on the facts and the statutes and constitutions of the various states involved. The principal distinction involved is that of the permanency of the invasion and the question of the use of the police

power of the state in an emergency. Petitioners cases invariably involve such facts which impel the courts to decide that the invasion was a permanent one. This was true, for example in the case of *Pumpelly* v. *G.B. & M. Canal Co.*, 13 Wall 166, 80 U.S. 557, 20 L. ed. 557, which was a leading case on the subject in this court. In that case a private corporation, under a special Wisconsin statute, built a dam which backed up the waters of a river and totally flooded plaintiff's lands for *six years* preceding the suit. This court found that this constituted a taking. This invasion was *total and permanent* and no question as to the use of the police power of a state was involved.

Respondent also submits that the facts of this case are unique and any questions involved would not be likely to recur. Respondent respectfully requests that if this court should take jurisdiction, that the Florida cases and other authorities set out in the Appellate Court's decision of this case be carefully considered in light of the entire record, and further that due to the inexactness of the matter complained of that respondent be granted permission to orally argue such merits and to file an additional brief directed thereto.

CONCLUSION

Inasmuch as the decision sought to be reviewed was not reviewable and no federal question had been raised or decided, this Honorable Court is without jurisdiction to review such decision and the petition for certiorari should be denied. It is also apparent that the case was correctly decided upon the merits and that no such material federal question could be involved so as to require this court to grant the petition. Respond-

ent therefore respectfully submits that the petition should be denied.

Respectfully submitted,

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